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IN THE

Supreme Court of the United States

MAY TERM—1946

No. [redacted] 58

GENERAL MADISON PEARSON, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

against

UNITED STATES *ex rel.* HARRY HOROWITZ.

No. [redacted] 59

GENERAL MADISON PEARSON, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

against

UNITED STATES *ex rel.* JACOB S. SAMUELS.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Harry Mesard
MEYER KREEGER,
Counsel for Respondents.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648 9 131

INDEX

PAGE

Statement as to Facts 2

Opinions Below 3

Jurisdiction 3

POINT I—The "panel," the various steps taken by the Local Board, the Appeal Board and by New York City Selective Service Headquarters in connection therewith, the examination of the registrant by the panel through its members, its recommendation and the communication of the same to the Local Board were each and all, unauthorized, illegal and without any warrant in law 3

The Levy Opinion (149 Fed. (2) 338) 9

CONCLUSION 14

Table of Cases Cited

PAGE

Harris v. Ross, 146 Fed. (2d) 355 ..... 12, 13
U. S. ex rel. Goodman v. Hearn, 153 Fed. (2d) 186 ..... 11, 12
U. S. ex rel. Levy v. Cain, 149 Fed. (2) 338 ..... 9, 10, 11, 12, 13, 14
U. S. ex rel. Rubin v. McGruder etc., 55 Fed. Supp. 947 4

Other Authorities Cited

Judicial Code, as amended by the Act of February 13, 1925, Section 240(a) 3

Local Board Memorandum 187:

Section 1, subdivisions a and b 5

Section 2 5

Selective Training and Service Act of 1940:

Regulations, Section 603.31 6

Regulations, Section 603.61 6

Regulations, Section 603.62 6

Regulations, Section 605.32 8

Regulations, Section 621.7 6

Regulations, Section 632.1 5

Title 50, Appendix, Section 310 6

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MAY TERM—1946

No. 947

GENERAL MADISON PEARSON, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

against

UNITED STATES *ex rel.* HARRY HOROWITZ.

No. 948

GENERAL MADISON PEARSON, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

against

UNITED STATES *ex rel.* JACOB S. SAMUELS.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Following their induction into the armed forces of the United States, respondents obtained writs of *habeas corpus* to review the propriety of said inductions. Upon the dismissal of the said writs by the United States District Court for the District of New Jersey, appeals were taken in each case to the United States Circuit Court of Appeals, which last mentioned Court reversed the orders of dismissal.

Statement as to Facts

Although the statement submitted by the petitioner on this application omits important facts and contains a number of inaccuracies as to others, the respondents, for the purpose of this application alone, are willing to adopt the same, in view of the fact that the nature of petitioner's application is not based upon the merits of respondents' claim insofar as the evidentiary facts are concerned.

As the record discloses, and as will be more particularly referred to herein, Selective Service Headquarters in New York City created a panel which it designated as the "Advisory Panel on Theological Classifications," and part of its purported functions was to examine Selective Service registrants claiming a IV-D classification, following which, recommendations regarding the classification of such registrants were transmitted to the local boards with which they had registered.

At page 2 of his petition under the caption "Question Presented," it appears that "the question presented is whether it was proper for the Selective Service Boards to consider these advisory recommendations in classifying respondents."

The Third Circuit Court in reversing the District Court wrote an opinion in which it appears that such reversal was based *solely* upon the actions of the said panel. Again, the only authorities referred to by petitioner on this application are those having to do with the propriety of the use of this panel,—decisions in different jurisdictions regarding the same.

In view of the above, we feel that any further presentation or discussion of the facts as are contained in the record would serve no useful purpose, as both the opinion and the sole question presented to this Honorable Court

in the petition herein constitute a question of law, not affected by the merits of the evidence submitted in behalf of respondents' claim for IV-D classification.

Opinions Below

The opinion of the Circuit Court of Appeals covered both cases and is reported in 151 Fed. (2d) 801.

Jurisdiction

Jurisdiction has been invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

POINT I

The "panel," the various steps taken by the Local Board, the Appeal Board and by New York City Selective Service Headquarters in connection therewith, the examination of the registrant by the panel through its members, its recommendation and the communication of the same to the Local Board were each and all, unauthorized, illegal and without any warrant in law.

At page 19 of his petition, the Solicitor General states that "we are advised by the Selective Service System" that the panel was established in January 1943 by the State Director of Selective Service for New York City. While we do not dispute the statement, the record herein is absolutely barren with respect thereto.

The State Director was appointed pursuant to the provisions of the Selective Training and Service Act of 1940, and his powers and duties are fully and specifically referred to therein, as well as in the Rules and Regulations adopted and promulgated in connection with the said Act.

We have been unable to find either in the Act or in the rules and regulations any authority for the creation of a panel of this nature.

As appears from the opinion in *U. S. ex rel. Rubin* v. *McGruder etc.*, 55 Fed. Supp. 947:

> "Lt. Colonel Durham testified that there was nothing in the Act providing for a theological panel or authorizing such a body as was used in the instant case; *that it exists only in New York* and was created by New York Headquarters to assist boards and advise them in cases involving divinity students." (Italics ours.)

There is nothing to indicate who created the panel, how it was chosen, the number of its members, who they are or who its chairman may be, if any; who, or how many sit on a case, whether a quorum is required, what the vote may be, unanimous or otherwise, and other elements too numerous to mention. Nor is there a suggestion as to its powers or limitations.

Selective Service Headquarters does not even permit the names of those present or the names of the person or persons who conducted the examination to appear on the transcript (R. 80-83). And the transcript is not even signed by a member or anyone else.

They give no reasons for their decisions, no basis for their opinions, and sign their names to nothing.

All we know is that it carries the impressive and dignified title of "Advisory Panel on Theological Classifications."

Search as one will, and no authority can be found to justify the registrant's appearance before and examination by any person or body other than the Local Draft Board and/or its members.

Again, Section 632.1 of the Selective Training and Service Act regulations, subdivision (b) thereof, provides:

> "It is the Local Board's responsibility to decide in the first instance the class in which each registrant shall be placed."

And there is an express direction with respect to divinity students covering this question, specifically provided for in Local Board Memorandum 187. Section 1, subdivisions a and b, sets forth the requirements necessary for a IV-D classification. Section 2 provides:

> "LOCAL BOARD TO MAKE DETERMINATIONS: The Local Board is charged with the *primary* responsibility of determining whether a registrant * * * fulfill(s) the above requirements of the Act and Regulations." (Italics ours.)

The Local Boards were created for the purpose of handling the cases of registrants within their respective immediate areas. The Act and regulations provide that through the medium of appeal boards, applications to Selective Service City Headquarters and appeals to the President, the machinery was set up whereby a registrant who felt that he had been unjustly dealt with by the Local Board or the Appeal Board could apply for relief to those higher in authority.

A court of last resort makes a "recommendation" to one of lower authority regarding a *decision* which the latter is about to render. The decision is made immediately thereafter and follows the recommendation made. How useless, how futile becomes an appeal from that decision to the authority upon whose recommendation the decision was based,—the *only* authority to which a final appeal may be taken?

By the creation of this panel and giving it the authority to examine the registrant, to be followed by a finding which

the highest authority, the City Director, transmits to the Local Board,—the very purpose of the regulation is defeated.

Petitioner seeks to justify the panel by reference to the Hearing Officer of the Department of Justice, medical boards under the Selective Service Act etc.; but their appointment and functions are specifically provided for by statute.

Repeated reference is made in the petition to the effect that the Local Board could seek information from any sources desired. Regulation 621.7 provides:

> "(a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant.
>
> (b) The local board is authorized to request the State Director of Selective Service to secure information from State or national welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant."

Surely it will not be claimed that the panel is a Local, State or National welfare or governmental agency. In addition to these provisions we find authority for the use of "medical advisory boards" (Regulation 603.31) and one composed of "examining physicians and dentists" (Regulations 603.61, 603.62) but nothing in the entire regulations to even indirectly suggest authority for the appointment of a panel of this kind.

Petitioner, as has the government on previous occasions, attempts to justify the creation of the panel by Title 50, Appendix, Section 310, which provides for "volunteer services." This clearly has to do with members of the various Boards and such clerical help, etc., as might be

obtained without pay. Further, it seems useless to even suggest that if this section were to be applied in the manner suggested by the petitioner, that the Local Board could appoint anyone, with entirely unauthorized powers, just so long as he was a "volunteer."

That is exactly what was done by the creation of the panel, and the suggested result followed.

At pages 25 and 26 of the petition herein it is urged that "so long as the information is relevant to the inquiry *and placed in the file when the registrant may examine it and reply*" it is immaterial whether it comes from the registrant * * * or from an expert advisory body established within the Selective Service System." * * * Respondents had access to the recommendations *and had full opportunity to challenge them*" etc. (Italics ours.)

In the light of the factual situation, these statements conclusively indicate the arbitrary and illegal nature of the panel and its operations. At pages 8, 9 and 10 of the petition there appears what purports to be "a statement for the record, dated May 2, 1944, which had been prepared by the advisory panel." In the first place there is no evidence that it was so prepared and this Honorable Court will observe that it does not even bear a signature.

Reference to the record will show that it was enclosed in a communication sent by the "Chief, Legal Division," to the Chairman of the Local Board, which communication states in part what petitioner failed to incorporate in his petition, "Enclosed herewith is a copy of the *Confidential* Statement for the Record * * *" and that it should be "considered together with the other information of record in determining the registrant's classification." (Capitalization ours.)

A *confidential* statement that "registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under

Selective Service law" together with a mass of hearsay, opinions and argument, unsupported by any evidence; unauthorized,—*not a member of the panel or anyone else* daring to subscribe his name thereto.

Surely the members of the Panel and the Chief of the Legal Bureau knew that Selective Service Regulation 605.32 specifically provides that:

> "No information shall be confidential as to * * * (1) the registrant, or any person having written authority from the registrant."

At page 25 of the petition we find that the Act did not "place limits on the sources from which local boards may seek information as a basis for classifying a registrant." Again we find a situation clearly indicating the manner in which the panel functions.

The Local Board never made any request for the services of the panel but as the petitioner, at page 6 aptly expresses it, "In April 1944, the Director of Selective Service for New York City undertook a review of Horowitz' selective service file" etc.

On May 10th, 1944 the Chief of the Legal Division wrote the Local Board that "the panel voted to recommend that registrant's status does not warrant his classification in Class IV-D (Pet., p. 7). This communication was probably received the following day, May 11th, and *on the same day* the Local Board reclassified him 1A.

Pursuant to the regulations, petitioner was accorded a hearing by the Local Board, and the latter called in and obtained the services of Rabbi Henry A. Schurr, probably the outstanding and best known Rabbi in Bronx County,—the county in which the Board is located. As a result of his examinations respondent was reclassified IV-D on June 1st. However, further communications from headquarters were received together with advice and on August 10th, he

was again reclassified 1A. Advice from and recommendations of the Headquarters panel may be followed by the Local Board, but not that obtained from one of its own choosing, irrespective of the high standing, character and integrity of its source.

At page 27 petitioner in support of the panel states "In dealing with individual claims to classification in IV-D the boards, as in Horowitz' case, have called in a minister of religion of the particular faith involved to advise the Board concerning the religious aspects of the case."

He failed however to call to the attention of this Honorable Court the fact that Headquarters and the Panel nullified the result of that advice in a few weeks.

The Levy Opinion (149 Fed, (2) 338)

The procedure and communications in the *Levy* case were practically the same as in the case at bar. The Court held at pages 341-342:

> "We hold that even though that practise be proper, it must be limited by two conditions, neither of which were here fulfilled: the personnel of the 'panel' must be disclosed to the registrant so that he may effectively challenge it; and the answers must be limited to ecclesiastical questions. Such 'panels' are properly helpful to local boards only upon subjects as to which the boards need specialized information; they must not be made a substitute for the boards themselves. Despite any categorical form in which their opinions are received, they have only the function of expert witnesses, who like them give their opinions. It seems to us fundamental to any fair trial that, like all other witnesses, their identity must be disclosed to the person whose liberty their testimony is to affect. Unless he knows who they are, it is impossible for him to show what biases or predilections may move them, or whether they have that acquaintance with the subject which alone makes

their testimony competent at all. Furthermore, their anonymity relieves them of the important sanction of publicity which guarantees their impartiality and solicitude, just as publicity guarantees the impartiality and solicitude of the tribunal itself. Nor is there any conceivable excuse for concealment that we can see, unless it be to shield the 'panel' from a criticism, which, if they are to be fit for their task at all, they should be sturdy enough to withstand.

Moreover, even though the personnel of the 'panel' in the case at bar had been known to the relator, and the members had been subject to impeachment and contradiction, the form of their 'recommendation' would still have made it improper for the Board to act upon it. All that we have is the report of the New York Headquarters that: 'After reviewing the file and examining the registrant, and upon consideration of all the circumstances, the panel voted to recommend that registrant's status did not warrant his classification in Class IV-D.' That was not a finding upon an incidental question, as to which the Board lacked an adequate background of acquaintance, and needed help; it was a decision upon the very issue to be decided. The distinction is by no means formal. The relator's exemption, which the 'panel' 'recommended' the Board to deny, depended upon several possibly mediative or constitutive facts: *e. g.*, the standing and character of the Seminary: whether it was abusing its standing by allowing itself to be used by registrants to evade the draft: whether the relator's studies were of a kind that an honest student would pursue: whether he honestly intended to become a rabbi. There may have been others. Upon some of these facts the Board did indeed need help, and we are assuming that it could put questions to a properly constituted 'panel' collectively and did not have to examine them individually as witnesses. But we can find no warrant for asking a 'panel' whether on all the facts it thought the registrant trustworthy; or whether the Seminary was making use of a curriculum, however fair and adequate on its face, in order to evade the draft. Yet it is impossible to know to what extent,

> if any, the general verdict of the 'panel' as we may call it—comprised, and depended upon, answers to just such questions; and insofar as its 'recommendation' in fact did depend upon such answers, the Board could make no use of it without abdicating their statutory duties, and devolving their responsibility. That was no technical irregularity of procedure; it went to the very heart of the controversy and vitiated the whole proceeding."

Every element present in the *Levy* case is present in the case at bar. The personnel of the panel was not disclosed to the registrant. The answers were not limited to ecclesiastical questions. The form of recommendation was exactly the same in both instances.

The decision in the *Levy* case was followed in the Third Circuit Court in the cases before this Honorable Court on this application in an opinion reported in 151 Fed. (2d) 801.

The only other Circuit Court decision on this question is that of *U. S. ex rel. Goodman* v. *Hearn*, 153 Fed. (2d) 186, and referred to at page 24 of the petition as representing "the sounder view." An application for a writ of certiorari in this case has been filed and is now pending in this Court.

We most respectfully submit that the decision of the Learned Court in that case is based upon a misconstruction and misunderstanding as to the law and statutes in this, and other cases of a similar nature. In fact the language and holding in that case is pure dicta and surplusage inasmuch as the Court had already held that "the *decisions* of such local boards *shall be final* except where appeal is authorized" and that the classifications were to be made by the local boards "without interference or review by the courts."

This conclusion is reached despite the overwhelming authority to the contrary contained in decisions of this

Honorable Court and practically every other Circuit Court in the country. Further evidence of the fact that the said Learned Court misunderstood and misconstrued the law on the subject is indicated by its decision in *Harris* v. *Ross*, 146 Fed. (2d) 355, where, at page 358, it was held:

> "* * * the local board had the power and duty to determine from the evidence in the record, from the proofs produced, *and from the extrinsic facts within the knowledge of the board, whether in evidence or not.* In the absence of such facts as were within the knowledge of the board, *but which are not in the record here,* this Court would be in no position to review the decision of the board on the facts even if the Court had the right to review actions which are committed to the discretion of the board." (Italics ours.)

This was tantamount to holding, as the Learned Court later did in the *Goodman* case, that the decision of the local board is final, for in every case in which a review was sought, the Court would be confronted with the fact that the local board was empowered to act on information within its own knowledge, though not contained in the record.

Although the references by the Fifth Circuit Court to the *Levy* case were not necessary for the decision reached, we will direct the attention of this Honoroble Court to a few statements contained therein further indicating that the said Court misconstrued and misunderstood, not only the law, but the facts as well.

It is suggested that in New York City the Panel was proper because of "there being many kinds of religions and ministers and students in that crowded population with which members of the local board might not be familiar." Why in New York City alone? Although numerically the population may be greater the same comparative situation is present in such cities as Chicago, Philadelphia and numerous other cities of the United States, and these local

boards do not seem to have found it necessary to be advised by and receive recommendations from any comparable panel.

Again, we find that "the panel advised that the courses of study taken were not a safe guide to the intentions of the students" etc. Knowledge of a religion in turn, is not "a safe guide to the intentions" of a student preparing for the ministry in such faith. "Intentions" can be judged by laymen as well, if not better.

The intention of one to become a minister of religion is best judged and is based, in large part, upon his honesty and integrity. "Experts" on religious matters are no better qualified to judge these qualities than a layman. True, as to knowledge of ecclesiastical matters connected with their religion, they are in a better position to determine and advise with respect to the knowledge possessed by the registrant on such matters,—which undoubtedly inclined the Court in the *Levy* case to hold that "the answers must be limited to ecclesiastical questions." Reference to the registrant's Selective Service file herein will disclose hardly a single question having to do with ecclesiastical matters. On the contrary, a mere reading of the examination conducted by the Panel shows a determined and vigorous cross-examination in an effort to justify the panel's conclusion "that registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under Selective Service Law (Pet. 10, 11).

And we further find in that opinion that "the regulations require that such outside information be put in writing in the file where the registrant may see and explain or deny it. That was all done in this case."

Disregarding its own holding in *Harris* v. *Ross*, made shortly before, that the local board may classify a registrant on information not contained in the record, it in

turn disregarded the fact that the same damaging "confidential" communication was contained in the file before it. This "confidential" communication contained "opinions" etc. which were not in the file and the registrant could not see it so as to "explain or deny it."

Without taking any issue with respect to the statement that Goodman knew some members of the panel, suffice it to say that he was finally classified 1A on January 30, 1945 and it was not until February 12, 1945 that the local board for the *first* time received from Selective Service the names of the members of the panel, and then as the communication stated, and the record shows only "for the information of the local board" (R. 188).

CONCLUSION

The application for a writ of certiorari herein should be denied.

~~In~~ Not urging that the opinion in the *Levy* case represents the "sounder view," may we borrow the language of the Learned Third Circuit Court in the instant case:

> "We fully agree with the conclusion reached by the Circuit Court of Appeals for the Second Circuit that the interjection of the statement and recommendation of the 'advisory panel' into the proceedings of the local boards vitiated those proceedings and rendered the relators' reclassification and induction invalid. The reasons for this conclusion are stated in Judge Learned Hand's opinion in the cited case with such clarity and force as to require no amplification by us."

Respectfully submitted,

MEYER KREEGER,
Counsel for Respondents.